Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

In re LORRAINE GRACE, individually and as Executrix of the ESTATE of OLIVER R. GRACE, GERALD I. WHITE, Trustee U/W Morgan H. Grace for the Marital Deduction Trust, GERALD I. WHITE, Trustee U/W Morgan H. Grace for the Non-Marital Deduction Trust and GERALD I. WHITE, Trustee U/W Morgan H. Grace for the Generation Skipping Trust and GERALD I. WHITE, Trustee of the JOHN E. GRACE Trust, individually and as stockholders of BRIGGS LEASING CORPORATION, suing on behalf of themselves and for the benefit of said corporation and for the class of all other stockholders of said corporation similarly situated,

Petitioners.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. By upholding the district court's code of silence as to the content of its *ex parte* conversation with the transferee court in violation of petitioners' due process rights, did the Court of Appeals for the Second Circuit "abdicate its expository and supervisory functions" under *Will v. United States*, 289 U.S. 90, 107 (1967)?

2. In transferring this case pursuant to a **solicitation** by the transferee court especially where petitioners are enforcing a federal judgment under the full faith and credit provisions of the Constitution, did the district court usurp its authority pursuant to 28 U.S.C. § 1404(a) under *Mallard v. United States District Court*, 490 U.S. 296, 309 (1987)?

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PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully petition for a Writ of Mandamus directing the Court of Appeals to issue a writ of mandamus to the district court ordering that:

(i) the Honorable Richard M. Berman of the Southern District set forth the content of his February 13, 2004 *ex parte* conversation with the Honorable David G. Trager of the Eastern District, including who initiated the conversation, and what was said by each Judge; and

(ii) the transfer orders of February 13 and March 30, 2004 pursuant to 28 U.S.C. § 1404(a) be reversed and this case and the case entitled *Grace, et. al. v. Harvey Schwartz, et. al.* No. 03 Civ. 5668 (S.D.N.Y.) be remanded to another district judge in the Southern District to issue an order requiring the retransfer of both cases from the Eastern District back to the Southern District.

ORDERS BELOW

The June 7, 2004 order of the Second Circuit denied petitioners' petition for a writ of mandamus directing Judge Richard M. Berman to, *inter alia*,: (1) disclose the content of his "*ex parte*"

conversation with Judge David G. Trager, which resulted in the transfer of *Grace v. Bank Leumi*, No. 02-CV-6612, from the Southern District of New York to the Eastern District of New York; and (2) reverse the February 13, and March 30, 2004 orders transferring this case (and a related case) to the Eastern District (1a - 2a). The Second Circuit held that it is "markedly reluctant" to grant a writ of mandamus of a transfer order and such a writ is "to be used only in extraordinary circumstances and not as a substitute for appeal" (1a - 2a). It failed to state any legal reason for the denial of findings of fact as to the content of the *ex parte* conversation between the two judges. It also failed to mention petitioners' claim that Judge Berman exceeded his authority by transferring this case to Judge Trager pursuant to Judge Trager's solicitation and also failed to give any legal reason as to why such solicitation is authorized by § 1404(a).[1]

The February 13, 2004 order of Judge Berman of the Southern District ordered the transfer to Judge Trager of the Eastern District pursuant to

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[1] In view of the Honorable Richard M. Berman's failure to state who initiated that February 13, 2004 conversation even though petitioners made two separate explicit requests for that finding, petitioners have drawn the inference that it was initiated by the Honorable David G. Trager.

28 U.S.C. § 1404(a) based solely on their February 13, 2004 telephone conversation (3a, note 1).

The March 30, 2004 Order of Judge Berman granted in part and denied in part plaintiffs' motion for reconsideration but left unchanged the transfer order of February 13, 2004 to the Eastern District (9a - 23a). The district court's April 5, 2004 order denied plaintiffs' motion to reconsider its March 30, 2004 Decision and Order (26a).

STATEMENT OF JURISDICTION

This jurisdiction of this Court is involved for the issuance of a writ of mandamus, an extraordinary writ, authorized by 28 U.S.C. § 1651(a) as a matter of discretion sparingly exercised and also under this Court's inherent power where the "traditional use of the writ in aid of appellate jurisdiction...has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction..." *Mallard v. United States District Court*, 490 U.S. 296, 308-309 (1987) citing the above holding from *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). *Mallard* further held (*id.*):

> Although "we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,'"..., we have required

> that petitioners demonstrate a "clear abuse of discretion,"...or conduct amounting to "usurpation of [the judicial] power,"...to be entitled to issuance of the writ. [citations omitted].

This Court then set forth two requirements to make sure that mandamus remains an extraordinary remedy. Petitioners must (i) carry the burden of showing that their right to issuance of the writ is "clear and indisputable" and (ii) "they lack adequate alternative means to obtain the relief they seek" (*Mallard* 490 U.S. at 309).

In connection with the first prong of that standard, in *Mallard*, 490 U.S. at 309, this Court held that the "District Court plainly acted beyond its 'jurisdiction' as our decisions have interpreted that term, for as we decide today, § 1915(d) does not authorize coercive appointment of counsel." Likewise, here, there is nothing in 28 U.S. § 1404(a) which authorizes a district court judge to transfer a case to a judge in another jurisdiction based on an *ex parte* **solicition** for the transfer from the transferee judge. Accordingly, as in *Mallard*,[2]

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[2] *Mallard* was cited by *Miller v. French*, 530 U.S. 327, 339 (2000) for the proposition that the "extraordinary remedy of mandamus...requires a showing of a 'clear and indisputable' right to the issuance of the writ."

the "District Court [here] plainly acted beyond its 'jurisdiction'" for § 1404(a) does not authorize *ex parte* **solicited** transfer of cases.

This Court in *Van Dusen v. Barrack*, 376 U.S. 612, 633-636 (1964), held that a transfer pursuant to § 1404(a) under the "interest of justice" provision does not permit a transfer which would seriously prejudice the plaintiff's claim. Without knowing the content of the *ex parte* conversation between the two judges, petitioners are deprived of the due process opportunity to learn (i) the motivation for the solicited transfer, (ii) whether the transfer will seriously prejudice plaintiffs' claim and (iii) whether the transfer is in the "interest of justice."

Thus, petitioners satisfied the first prong of the legal standard adopted in *Mallard*, namely, that their right to have the writ issued is "clear and indisputable." Accordingly, the traditional use of the writ will be in aid of this Court's appellate jurisdiction.

To meet the second requirement of the legal standard, petitioners must show "that they **lack adequate alternative** means to obtain the relief they seek" (*Mallard*, 490 U.S. at 309).[3]

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[3] Emphasis supplied throughout unless otherwise noted.

Realistically, there is no adequate alternative means for petitioners to obtain disclosure of the substance of the February 13, 2004 *ex parte* telephone conversation between the two judges. The judge who issued the order has twice refused to respond to that explicit request in both of petitioners' motions. The District Court judge issuing the transfer order did not even acknowledge that the request for such findings of fact as to the conversation's content had been made. There was also no statement of the district court's legal reasoning for denial of both requests.

In the Second Circuit's order denying petitioners' petition for a writ of mandamus, there was simply an acknowledgement that petitioners' requested that Judge Richard M. Berman be directed to "(1) disclose the content of his *ex parte* conversation with Judge David G. Trager..." (1a). The Second Circuit's order failed to make any statement whatsoever of that court's legal reasoning for denying petitioners' requested disclosure of the content of that "ex parte" conversation. Moreover, the Second Circuit's order failed to mention the District Court's complete silence on the same issue. The Second Circuit also failed to mention petitioners' arguments of denial of due process of law and the full faith and credit provision of the Constitution in support of petitioners choice of forum and failed to state any legal reason for denial of those arguments.

In *Will v. United States*, 289 U.S. 90, 107 (1967) this Court vacated the issuance of a mandamus where the justification for it was that the writ "serves a vital corrective and didactic function" and held:

> ...we fail to see how they can be served here **without findings of fact** by the issuing court and some statement of the **court's legal reasoning**. A mandamus from the blue without rationale is tantamount to **an abdication of the very expository and supervisory functions of an appellate court** upon which the Government rests its attempt to justify the action below.

That holding is equally applicable where both the District Court and the Court of Appeals denied the issuance of a mandamus "without findings of fact and some statement of the court's legal reasoning." Certainly, the Court of Appeals here abdicated the "very expository and supervisory functions of an appellate court" in its failure to require the district court to make (i) findings as to the conversation's content with Judge Trager and (ii) to state any legal reasoning.

If petitioners do not obtain the requested disclosure now by this mandamus, there will be no

"**adequate** alternative means" to obtain it. Realistically, petitioners' would be required to proceed before Judge Trager even though he lacked jurisdiction because of his solicitation. This court should now determine the legality of the solicitation, the transfer, and Judge Trager's jurisdiction. Indeed, the ruling by Judge Berman denying that requested relief sub silento and the denial of the petition for mandamus by the Second Circuit for that same relief without any statement of the court's reasoning is the law of the case. Thus, there is no "adequate alternative means" to effectively obtain the relief requested by this mandamus.

The facts and law demonstrate that this case requires the extraordinary writ of mandamus.

The order of the Second Circuit denying petitioners' petition for a writ of mandamus was entered on June 7, 2004 (2a). Therefore, this Petition for a Writ of Mandamus is timely filed.

STATUTES INVOLVED

28 U.S.C. § 1404 entitled "Change of venue" provides:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer

> any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1651 entitled "Writs" provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

As a result of a 1993 default judgment on liability and a settlement agreement on damages days before a scheduled trial before visiting Judge Charles R. Wolle, plaintiffs shareholder class were given a judgment against defendant Briggs Leasing Corporation ("Briggs") for the amount of $4,028,000 on August 15, 1997 in the United States District Court for the Eastern District of New York in *Grace, et.al. v. Rosenstock, et.al.* (Index No. 85-CV-2039 (DGT) hereinafter "Grace #1"). A writ of execution against Briggs by plaintiffs as judgment creditors was returned unsatisfied on March 10, 1998. As a result of the same settlement agreement, plaintiffs were also granted a judgment for the amount of $6,912,288 against defendant Robert

Rosenstock. A writ of execution against Rosenstock was returned unsatisfied.

The case against Robert Genser, the other defendant in Grace #1, who was only a 7% shareholder in Briggs, was severed by order of Judge Trager in June 1997 so that Genser avoided a scheduled trial before visiting Judge Charles R. Wolle. After a trial against Genser in 1998, United States Magistrate Judge Robert M. Levy dismissed the claims as a matter of law. Plaintiffs appealed to the Second Circuit and brought up for review the denial of plaintiffs' motion to supplement their complaint to add parties and claims, *inter alia*, to recapture Briggs' fraudulent conveyances of $10.6 million of mortgages and notes, and $4.1 million of cash (total amount of $14.7 million) to Bank Leumi, Berger, Mack and Apex Marine for the unfair consideration of less than $2 million. The Second Circuit affirmed (*Grace, et.al., v. Rosenstock, et.al.*, 228 F.3d 40 (2d Cir. 2000) *cert. den.*, 532 U.S. 923 (2001)). In return for Briggs' fraudulent conveyances, most of the consideration from Bank Leumi et.al., went directly into Robert Rosenstock's personal bank account or was used for Rosenstock and Genser's personal ventures. As a result of the fraudulent conveyances, Briggs was reduced to an empty shell. Inasmuch as those fraudulent conveyances occurred during the Grace #1 litigation, it triggered plaintiffs' claims under New York's Debtor Creditor Law, Section 273-a, which

did not accrue for purposes of statute of limitations until execution on the judgment is returned unsatisfied.

In affirming the denial of plaintiffs' motion to supplement the complaint in Grace #1, the Second Circuit explicitly held:

> ...we have suggested that generally the denial of leave to bring in new defendants does not have preclusive effect with respect to the claims against those defendants [citation omitted].

(*Grace,* 228 F.3d at 56). No appeal was taken from the August 15, 1997 judgment; it was not modified or altered on the appeal. Bank Leumi, Berger, Mack, and Apex Marine appeared in the District Court and the Court of Appeals and successfully argued against being added as parties. Costs in Grace #1 were taxed and the case was closed.

On August 19, 2002, plaintiffs class, as judgment creditors, instituted this action in the Southern District 02 CV 6612 (RMB) (hereinafter Grace #2). Grace #2 is based on the Eastern District's Certification of that August 15, 1997 judgment against Briggs, *inter alia*, to set aside Briggs' fraudulent conveyances of $10.6 million of mortgages and notes, and $4.1 million of cash (or a total of $14.7 million), without fair consideration, to

defendants Bank Leumi, Berger, Mack and Apex Marine (hereinafter "Bank Leumi, et.al.") and to collect plaintiffs $4,028,000 judgment against Briggs plus post judgment interest of $1,258,272 for a total of $5,286,272. That August 15, 1997 federal judgment is the basis for subject matter jurisdiction in the Southern District in Grace #2 (*Epperson v. Entertainment Express, Inc.* 242 F.3d 100, 106-107 (2d Cir. 2001)).

In November 2002, Judge Trager gave non party defendants Bank Leumi, Berger, Mack and Apex Marine permission to make a motion in Grace #1 to set aside the August 15, 1997 judgment against Briggs as allegedly void under Rule 60(b)(4) of the Federal Rules of Civil Procedure. The matter was fully briefed by July 2003. In December 2003 plaintiffs' counsel sent a letter to Judge Trager challenging his jurisdiction over the non-party movants Bank Leumi, et.al., especially since they were never made parties in Grace #1, having successfully resisted plaintiffs' motion to add them as parties to that case. Oral argument on the non-parties Rule 60 motion in Grace #1 was scheduled to and took place before Judge Trager on March 16, 2004. In the interim, Judge Richard Berman had placed the Grace #2 action on the suspense docket and the parties were scheduled to report back to him in May 2004 as to the status of the motion before Judge Trager.

On February 13, 2004, Judge Trager had a telephone conversation with Judge Berman without plaintiffs' knowledge or consent. After that conversation, Judge Berman on that same day, entered an order pursuant to 28 U.S.C.§1404(a) transferring Grace #2 - then approximately 18 months old - to the Eastern District for assignment to Judge Trager (3a). It is evident that **the moving force for that transfer order was the conversation between Judges Trager and Berman**. None of the parties had filed a motion seeking such an order. Indeed, the Order states in note 1: "On February 13, 2004, this Court spoke with Judge Trager who has graciously agreed to accept this case" (3a). The order reads (3a -4a):

> In the interest of justice, the Court hereby transfers this case pursuant to 28 U.S.C.§ 1404(a) to the United States District Court for the Eastern District of New York where a related case is currently pending before the Honorable David G. Trager entitled Grace v. Rosenstock, No. 85 Civ. 2039 (E.D.N.Y.).

The transfer took place on February 18, 2004.

On March 2, 2004, plaintiffs moved to have Judge Berman reconsider his order to transfer, to

recall the actual transfer and for a stay to allow plaintiffs adequate time to file a petition for a writ of mandamus with the United States Court of Appeals for the Second Circuit. While plaintiffs' motion was labeled a motion for Judge Berman to "reconsider" his transfer order, this was plaintiffs' **first** opportunity to set forth their opposition to any transfer to the Eastern District.

In its Decision and Order of March 30, 2004 (9a-23a) which granted in part and denied in part plaintiffs' March 2, 2004 reconsideration motion, the district court for the first time made certain findings. The Court essentially acknowledged that findings are required. However, even though plaintiffs' principal point for reconsideration was that Judge Berman failed to make critical findings relating to the content of his February 13, 2004 conversation with Judge Trager, including who initiated it, Judge Berman failed to even mention that plaintiffs' requested that the court set forth findings as to the content of that conversation.

On April 2, 2004 plaintiffs moved to reconsider the March 30th Decision and Order and only requested that Judge Berman make findings as to the contents of his *ex parte* conversation with Judge Trager on February 13th (24a-25a). Plaintiffs cited two new authorities about the need for remand to another district court judge where there was *ex parte* conduct by the first district court judge:

United States v. Louis 814 F.2d 852 (2d Cir. 1987) and *U.S. v. Ianniello* 866 F.2d 540 (2d Cir.1989).

On April 5, 2004 the district court denied plaintiffs' motion for reconsideration of the March 30th Order and **again** failed to make any findings as to the content of that February 13th conversation, failed to discuss that conversation and failed even to mention it (26a).

On April 16, 2004, petitioners filed their Petition For A Writ of Mandamus with the United States Court of Appeals for the Second Circuit. On June 7, 2004 the Second Circuit entered its order denying that petition (1a-2a). While the Second Circuit mentioned petitioners' request for findings of fact as to the content of the *ex parte* conversation between the two judges, it failed to give any legal reason for denying that specific requested relief and failed to mention or discuss petitioners' argument that it was a denial of due process of law. The Second Circuit failed to mention or discuss petitioners' claim that Judge Berman exceeded his authority under 28 U.S.C. § 1404(a) in ordering a transfer of this case to Judge Trager based on Judge Trager's solicitation of that transfer. The Court also ignored petitioners' argument that the claim based on the full faith and credit provision of the Constitution gave almost conclusive support for petitioners' choice of forum.

REASONS FOR GRANTING THE WRIT

1. The Second Circuit Abdicated Its "Expository And Supervisory Functions" In Not Requiring The District Court To Make Findings As To The Content Of The Conversation Between The Two District Court Judges And In Failing To Provide Any Legal Reasoning

Will, 289 U.S. at 107, held that a court issuing a mandamus is required to make "findings of fact" and give "some statement of the court's legal reasoning." Otherwise, a "mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court..." The same reasoning should be applicable to a court's denial of a writ of mandamus.

While the Second Circuit did mention that petitioners requested disclosure of the content of the *ex parte* conversation between the two district court judges, it omitted any discussion of its *sub silento* denial of that request and further omitted any legal reasoning. Moreover, the Second Circuit failed even to mention petitioners' argument that the lack of findings as to the conversation's content was a denial of due process of law. Indeed, the district court effectively adopted a code of silence as to the conversation between the two judges. Petitioners

were denied the opportunity to frame any arguments as to that conversation's content.

The District Court's arbitrary refusal to make findings setting forth the content of that telephone conversation with Judge Trager also constitutes a denial of due process of law. Plaintiffs are severely handicapped by not knowing anything about the substance of that crucial February 13 conversation. By withholding the content, Judge Berman failed to give plaintiffs a full opportunity to present arguments in opposition to the transfer. By invoking a **code of silence** as to that crucial telephone conversation, Judge Berman has effectively denied plaintiffs' due process of law. Furthermore, such a code of silence erodes the integrity of the federal judiciary and is no substitute for "legal reasoning" required by *Will, id.*

U.S. v. Louis, 814 F.2d 852 (2d Cir. 1987) demonstrates the requirement that *ex parte* conversations be set forth by the district court judge. In *Louis*, prior to imposing sentence, the trial judge gave an extended statement of his *ex parte* meeting with a judge of the High Court of Hong Kong relating to sentencing standards in Hong Kong (id. at 857-858). The Second Circuit stated that "Louis had no opportunity to challenge the accuracy of the information furnished to the district judge" by the Hong Kong judge and no opportunity to determine whether the sentencing standards

applied to him or whether they existed at all (id.). Thus, the Second Circuit remanded the case for sentencing before another judge. Also see *U.S. v. Ianniello* 866 F.2d 540 (2d Cir. 1989).

Under the circumstances, mandamus is required here for a direction to the Courts below to disclose the content of that *ex parte* conversation between the two judges and who initiated it.

2. The Court Of Appeals Should Have Issued A Mandamus Because The District Court Usurped Its Authority Under 28 U.S.C. § 1404(a) By Transferring This Case Pursuant To A Solicitation Of Transfer Under *Mallard*, 490 U.S. at 309

The Court of Appeals overlooked petitioners argument that petitioners choice of forum should be almost conclusive where their claim is based upon a federal judgment that is entitled to full faith and credit under the Constitution.

It should go without saying that it is not the business of federal judges to solicit the transfer of cases from other jurisdictions. On its face, such conduct raises questions about a judge's motivation in seeking such transfers. Moreover, we are asking this Court to hold such conduct is not authorized by the law. Judge Trager's conduct in soliciting the transfer to him caused Judge Berman to usurp his

authority in ordering the transfer which should require the issuance of the extraordinary writ of mandamus (*Mallard*, 490 U.S. at 308-109).

In *Olinick & Sons v. Dempster Brothers, Inc.*, 365 F.2d.439, 446 (2d Cir. 1966) in a *concurring* opinion Judge Friendly held:

> Conceptual and practical considerations unite to demand recognition that when there is no question of transferability, our power to issue mandamus is limited to those cases, exceedingly hard to imagine in this circuit, where a district judge...**has granted...one in such flagrant defiance of accepted principles as to evidence impermissible motivation.**

Here, we have a very unusual fact situation where Judge Trager apparently, effectively solicited Judge Berman to transfer this case to him. Judge Trager's conduct here is "in such flagrant defiance of accepted principles as to evidence impermissible motivation." What occurred here fits squarely under Judge Friendly's reasoning.

This Court in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), held that a transfer pursuant to §1404(a) under the "interest of justice" provision

does not permit a transfer which would seriously prejudice the plaintiff's claim (376 U.S. at 626-643). This Court held (376 U.S. at 633-636):

> Of course, these cases allow plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected. There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.
>
> x x x
>
> And, more importantly, courts would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who had initially selected a permissible forum.

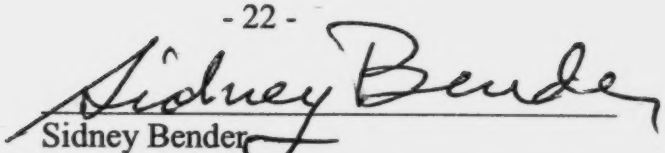
The Second Circuit in *Golconda Mining Corporation v. Herlands,* 365 F.2d 856, 857 (2d Cir. 1966) held that "plaintiff's choice of forum is a factor to be accorded substantial weight" on disposition of a

§1404(a) motion. Both courts below failed to follow *Golconda*. They also failed to give any weight to the fact that plaintiffs' choice of forum is especially important and indeed almost conclusive where suit is on a judgment entitled to full faith and credit. By acting beyond the authority given to him by § 1404(a), Judge Berman's conduct amounted to a "usurpation" of his judicial power (*Mallard*, 490 U.S. at 308-309). We are asking this court to hold that § 1404(a) does not authorize the **solicitation** of transfers to a federal judge in another district, especially where there are no findings of fact as to the critical conversation which caused it and no legal reasoning to support it, *Will*, 289 U.S. at 107. Accordingly, the Court of Appeals failed to meet its 'expository and supervisory functions" as directed by *Will*, *id.*

CONCLUSION

Petitioners have made a showing of a "clear and indisputable" right to the issuance of the extraordinary writ of mandamus together with a showing that they "lack adequate alternative means to obtain the relief they seek."

Dated: New York, New York
September 7, 2004



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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of June two thousand and four,

Present:

Hon. Ellsworth Wan Graafeiland,
Hon. Robert D. Sack,
Hon. Richard C. Wesley,
Circuit Judges.

In re: Lorraine Grace, *et al.*,

Dkt No: 04-1905-op

Petitioners.

Petitioners petition for a writ of mandamus directing Judge Richard M. Berman to: (1) disclose the content of his "*ex parte*" conversation with Judge David G. Trager, which resulted in the transfer of Grace v. Bank Leumi, No. 02-CV-6612, from the Southern District of New York to the Eastern District of New York; (2) reverse the

February 13, and March 30, 2004 orders transferring that case (and a related case) to the Eastern District (3) remand that case (and the related case) to another judge in the Southern District, and order that judge to issue an order requiring the re-transfer of both cases from the Eastern District to the Southern District; and (4) in the alternative, remand the matter to Judge Berman with instructions to set forth the information in the conversation with Judge Trager, and then direct that the case and the related case be re-transferred from the Eastern District back to the Southern District. Upon due consideration, it is ORDERED that the petition is denied. *See Songbyrd, Inc. v. Grossman*, 206 F.3d 172, 177 n.5 (2d Cir. 2000) ("Our court has acknowledged that availability of review of a transfer order . . . by petition for mandamus, but has also been markedly reluctant to grant the writ"); *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987) (mandamus meant to be used only in extraordinary circumstances and not as a substitute for appeal).

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

By: _____
Olivia M. George
Deputy Clerk

Filed U.S. Court of Appeals for the Second Circuit, June 7, 2004

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LORRAINE GRACE, et al.,

Plaintiffs,

- against -

BANK LEUMI TRUST CO., et al.,

Defendants.

----------x

ORDER
02 Civ. 6612 (RMB)

In the interest of justice, the Court hereby transfers this case pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Eastern District of New York where a related case is currently pending before the Honorable David G. Trager entitled Grace v. Rosenstock, No. 85 Civ. 2039 (E.D.N.Y.).[1]

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[1] On February 13, 2004, this Court spoke with Judge Trager who has graciously agreed to accept this case.

The Clerk is respectfully requested forthwith to transfer the case to the United States District Court for the Eastern District of New York.

Dated: New York, New York
February 13, 2004

RICHARD M. BERMAN, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LORRAINE GRACE, *et al.*,

Plaintiffs,

-against-

BANK LEUMI TRUST COMPANY OF NEW YORK, *et al.*,

Defendants.

----------x

02-CV-6612 (RMB)

NOTICE OF MOTION TO RECONSIDER ORDER TO TRANSFER THIS CASE, TO RECALL ACTUAL TRANSFER AND FOR A STAY

PLEASE TAKE NOTICE, that plaintiffs, by their attorneys, Leventritt Lewittes & Bender, upon the Declaration of Sidney Bender, Esq., the exhibits annexed thereto, plaintiffs' memorandum, and the pleadings and proceedings heretofore had herein, will move this Court in Courtroom 706, at the United States District Court for the Southern

District of New York located at 40 Centre Street, New York, New York, on April 1, 2004, for the Court, pursuant to Local Civil Rule 6.3, to reconsider its February 13, 2004 Order (docketed on February 18, 2004) to transfer this case pursuant to 28 U.S.C.§ 1404(a) to the United States District Court for the Eastern District of New York and for an Order recalling the actual transfer of this case on February 18, 2004 to the Eastern District of New York and staying any further transfer in order to allow plaintiffs adequate time to file a petition for a writ of mandamus to the United States Court of Appeals for the Second Circuit and for such other further relief as this Court deems just and proper.

Dated: New York, New York
March 2, 2004

Respectfully submitted;

LEVENTRITT LEWITTES & BENDER

By: _____ (5341)
A member of the firm
19 W. 44th St., Suite 711
New York, New York 10036
(646) 562-0034

TO: Attorneys of Record

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LORRAINE GRACE, *et al.*,

Plaintiffs,

-against-

BANK LEUMI TRUST CO., *et al.*,

Defendants.

----------x

ORDER
02-CV-6612 (RMB)

In connection with Plaintiffs' motion, dated March 2, 2004, to reconsider the Court's order, dated February 13, 2004, "transferr[ing] this case pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Eastern District of New York," the parties are directed to submit simultaneously to the Court additional supporting materials, as follows: memoranda of law discussing: (a) the bases for subject matter and personal jurisdiction in the United States District Court for the Southern District of New York with respect to each and every party (include a discussion of

Epperson v. Entertainment Express, Inc., 242 F.3d 100 (2d Cir. 2001)); and (b) whether (and specifically how) jurisdiction could be exercised by this Court (the Southern District of New York) but not by the Eastern District of New York.

The parties' submission (one from Plaintiff's and one joint submission from all Defendants), including memoranda of law no longer than twelve pages, double spaced, should be served, filed, and delivered to Room 201 of the Thurgood Marshall Courthouse, 40 Centre Street, New York, New York by 2:00 p.m. on Wednesday, March 24, 2004.

Dated: New York, New York
March 17, 2004

RICHARD M. BERMAN, U.S.D.J.

cc: Hon. David G. Trager

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LORRAINE GRACE, et al.,

Plaintiffs,

- against -

BANK LEUMI TRUST COMPANY OF NEW YORK, et al.,

Defendants.

----------x

02 Civ. 6612 (RMB)

DECISION AND ORDER

1. Introduction

Plaintiffs are a class of former shareholders ("Plaintiffs") of Briggs Leasing Corporation ("Briggs") who purportedly hold a $4,028,000 judgement ("Judgement") entered on August 15, 1997 against Briggs in the United States District Court for the Eastern District of New York by the Honorable David G. Trager in an action titled Grace, et al. v. Rosenstock, et al., Case No. 85-CV-

2039 (E.D.N.Y.) ("Grace 1"). Plaintiffs commenced this action ("Grace 2") on August 19, 2002 and filed an amended complaint on October 31, 2002 against Bank Leumi Trust Company of New York ("Bank Leumi"), David Mack ("Mack"), the Estate of Leo V. Berger ("Berger"), Apex Marine Corp. ("Apex"), and Briggs (together, "Defendants") to set aside certain allegedly fraudulent conveyances from Briggs to other Defendants. (Amended Complaint, dated October 31, 2002 ("Compl."), ¶ 1-2.)

On February 13, 2004, the Court, acting sua sponte and "[i]n the interest of justice," "transferr[ed] this case pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Eastern District of New York where a related case [Grace1] is currently pending . . ." (Order, dated February 13, 2004 ("Transfer Order").) On February 18, 2004, the Clerk of this Court transferred Grace 2 to the Eastern District of New York where it was assigned to Judge Trager under Case No. 04-708. (Pl. Mem. at 6.)

On March 2, 2004, Plaintiffs' moved pursuant to Local Civil Rule 6.3 for reconsideration of the Transfer Order, "to recall the actual transfer which occurred on February 18, 2004 to the Eastern District and if the transfer is not recalled, then to stay any further transfer to allow plaintiffs adequate time to file a petition for a writ of mandamus with the United States Court of Appeals for the Second

Circuit." (Plaintiffs' Memorandum In Support of Motion to Reconsider Order to Transfer, to Recall Actual Transfer and For a Stay, dated March 2, 2003 ("Pl. Mem."), at 1.) On March 9, 2004, Defendants Mack, Berger, and Apex filed a memorandum of law opposing Plaintiffs' reconsideration motion (see Memorandum of Defendants Mack, Berger, and Apex, dated March 9, 2004 ("Mack Defs' Mem.")), and Defendant Bank Leumi filed a separate memoranda of law (see Memorandum of Defendant Bank Leumi USA, dated March 9, 2004 ("Bank Leumi Mem."). On March 10, 2004, Plaintiffs filed a reply memorandum of law ("Pl. Reply"). At the Court's request, the parties also filed supplemental briefs on March 24, 2004 addressing, among other jurisdictional questions, "whether (and specifically how) jurisdiction could be exercised by this Court (the Southern District of New York) but not by the Eastern District of New York." (See Plaintiffs' Supplemental Memorandum of Law ("Pl. Supp. Mem."); Defendants' Joint Supplemental of Law ("Def. Supp. Mem.").) **For the reasons set forth below, Plaintiffs' reconsideration motion is granted in part and denied in part.**

II. Legal Standard

Motions for reconsideration are governed by Rule 59(e) of the Federal Rules of Civil Procedure and Local Civil Rule 6.3. See Schaffer v. Soros, No.

92 Civ. 1233, 1994 WL 592891, at *1 (S.D.N.Y. Oct. 31, 1994). "[R]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked--matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995).

III. Analysis

Plaintiffs argue, among other things, that reconsideration is warranted because the Court failed to make "findings" before transferring the action (Pl. Mem. at 1-2); "Plaintiffs' choice of forum is a factor to be accorded substantial weight on a disposition of a § 1404(a) transfer" (id. at 2); the transferee court "does not have personal jurisdiction over" Bank Leumi, Mack, Berger, or Apex, and thus no "related case is currently pending before the Honorable David. G. Trager . . ." (id. at 3-4); and Plaintiffs' counsel properly chose to file this action in the Southern District of New York rather than the Eastern District because of Judge Trager's alleged lack of "impartiality" (Pl. Supp. Mem. at 9-11 ("the simple issue is might plaintiffs' counsel reasonably question the impartiality of Judge Trager")).

Defendants counter, among other things, that: "[a]ll defendants acknowledge that they are

subject to personal jurisdiction in "both the Southern and Eastern District of New York, and that they are "unaware of any statute or rule or law pursuant to which the Eastern District of New York would have any more, less, or different jurisdiction over the parties herein, and the claims asserted in plainitiffs' complaint, than the Southern District of New York" (Def. Supp. Mem. at 2); and venue is properly found in the Eastern District under 28 U.S.C. § 1391(b)(2) because "the judgment which plaintiffs are attempting to enforce was rendered in the Eastern District; Briggs Leasing Corp. (the corporation which allegedly made the fraudulent conveyances at issue herein) resided in the Eastern District at the time; and the real property mortgaged by Briggs was situated in New York" (id. at 3).

There is no basis to abrogate the Transfer Order because Plaintiffs have no "point[ed] to controlling decisions or date that the court overlooked . . . that might reasonably be expected to alter the conclusion reached by the court." Shrader, 70 F.3d at 257. At the same time, the Court does grant reconsideration for the limited purpose of amplifying its earlier decision. See Evans v. Port Authority of New York, No. 00 Civ. 5752, 2002 WL 1941557, at *1 (S.D.N.Y. Aug. 22, 2002) (granting reconsideration in order to clarify decision); Mattel, Inc. v. Robarb's, Inc., No. 00 Civ. 4866, 2001 WL 797478, at *2 (S.D.N.Y. July 12, 2001) ("Reconsideration is granted in part, solely to

clarify the reasoning supporting the Court's holding . . .").

"The threshold question for a court considering a [transfer] under § 1404(a) is whether the action could have been brought in the district to which the moving party seeks to transfer the action." Alexander Ins. Ltd. v. Executive Life Ins. Co., No. 90 Civ. 8268, 1991 WL 150224, at *2 (S.D.N.Y July 29, 1991). "[A]n action might have been brought in another forum if, at the time the action was originally filed, the transferee court would have had subject matter jurisdiction and personal jurisdiction over the defendants, and if venue would have been proper in the transferee court." Posven, C.A. v. Liberty Mut. Ins. Co., No. 02 Civ. 0623, 2004 WL 63497, at *7 (S.D.N.Y. Jan. 12, 2004).

It is beyond dispute that both the Southern and Eastern Districts of New York could exercise subject matter jurisdiction over Plaintiffs' claims. (Pl. Supp. Mem. at 1-4; Def. Supp. Mem. at 1-2.) See Epperson v. Entertainment Express, Inc., 242 F.3d 100, 106-7 (2d Cir. 2001) ("Where the post-judgment proceeding is an effort to collect a federal court judgment, the courts have permitted judgment creditors to pursue, under the ancillary enforcement jurisdiction of the court, the assets of the judgment debtor even though the assets are found in the hands of a third party.").

Defendants also acknowledge that both the Southern and Eastern Districts may exercise personal jurisdiction over all Defendants. (Def. Supp. Mem. at 2.)[2] The Court cannot divine a situation where the Southern District would have personal jurisdiction but the Eastern District would not. Plaintiffs assert the dubious proposition that this Court may exercise personal jurisdiction over all of the Defendants but that the Eastern District - just over the Brooklyn Bridge - may not. (Pl. Supp. Mem. at 4-12.) Plaintiffs' own jurisdictional allegations that Defendants either reside in New York or committed fraudulent actions in New York belie this proposition and clearly suggest the action "might have been brought" in the Eastern District. (Compl. ¶¶ 20-24; Pl. Supp. Mem. at 4-7.)[3]

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[2] Plaintiffs did not directly respond to the Court's invitation to explain the bases for personal jurisdiction in this district (S.D.N.Y.) (see Order, dated March 17, 2004), other than to state that all of the Defendants received service of process and were incorporated in or resided in New York at relevant times, and that certain of the alleged fraudulent conveyances occurred in New York (Pl. Supp. Mem. at 4-7; see also Compl. ¶¶5-11; CPLR § 301 (New York residence); CPLR § 302(a)(2) (tortious acts committed in New York).

[3] This case is distinguishable from Hoffman v. Blaski, 363 U.S. 335, 342-43 (1960) ("We do not think the § 1404(a) phrase 'where it might have been brought' can be interpreted to mean . . . 'where it may now be rebrought, with defendants' consent.'").

It is also undisputed that venue is proper in the Eastern District under 28 U.S.C. § 1391(b)(2), as that is where "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391 (b)(2). Among several other things, according to the Complaint, most of the alleged fraudulent conveyances involved real property located in the Eastern District. (Compl. ¶¶ 20-24.)

"[T]he Court next considers whether the convenience of the parties and witnesses and the interest of justice warrant a transfer." Brockmeyer v. May, No. 98 Civ. 5521, 1999 WL 191547 at *3 (S.D.N.Y. Apr. 6, 1999). Courts consider several factors, including: "(1) the place where the operative facts occurred; (2) the convenience of the parties; (3) the convenience of the witnesses; (4) the relative ease of access of proof; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the plaintiff's choice of forum; (7) the forum's familiarity with the governing law; and (8) trial efficiency and the interests of justice." Clarendon Nat'l Ins. Co. v. Pascual, 99 Civ. 10840, 2000 WL 270862, at *3 (S.D.N.Y. Mar. 13, 2000).

The first factor, "the place where the operative facts occurred," favors transfer, as the Complaint's allegations describe property and

parties located in the Eastern District. (See Compl. ¶¶ 9-11 (Plaintiff alleges that Mack, Berger, and Apex resided in the Eastern District and that the real property at the center of the allegedly fraudulent scheme is located in Great Neck in the Eastern District).) Plaintiffs' Supplementary Memorandum alleges that actions were also taken in the Southern District. (Pl. Supp. Mem. at 5-6.) Factors two through five, involving the convenience or availability of witnesses and parties, also support transfer (or are neutral), as "[p]hysically, the Eastern and Southern District Courthouses are separated by only four subway stops, so the requested transfer of venue would create no logistical difficulty for parties or witnesses." Richardson v. City of New York, No. 87 Civ. 214, 1988 WL 156324, at *4 (S.D.N.Y. Oct. 14, 1988).

With regard to the sixth factor, while courts generally defer to a plaintiff's choice of forum, 'that choice is not absolute," Kieffer v. E.F. Hutton, No. 83 Civ. 6802, 1984 WL 221, at *1 (S.D.N.Y. Apr. 19, 1984), and "in class actions little wright is given to the plaintiffs' choice," Butcher v. Gerber Products Co., No. 98 Civ. 1819, 1998 WL 437150, at *10 (S.D.N.Y. Aug. 3, 1998). And, where, as here, Plaintiffs' choice of forum may be influenced by their effort to avoid a particular judge, Plaintiffs' choice of forum s accorded little weight.[4] See James

[4] See discussion, infra.

v. Prudential-Bache Securities, Inc., Nos. 90 Civ. 4995, 90 Civ. 5505, 1990 WL 180193, at *5 (S.D.N.Y Nov. 9, 1990) (in granting transfer under § 1404, according plaintiffs' choice of forum "little weight" because "there is the possibility that plaintiffs in this instant actions have filed suit in the Southern District of New York to avoid [transferee judge's] denial of class certification in [related actions in transferee court]."). The seventh factor is neutral (or, for the reasons stated below, favors transfer), as both fora have "familiarity with the governing law."

The Court's decision to transfer the action to the Eastern District was also influenced by the eighth factor, "trial efficiency and the interests of justice." Kenwin Shops, Inc. v. Bank of Louisiana, No. 97 Civ 907, 1999 WL 294800, at *4 (S.D.N.Y. May 11, 1999). As Plaintiffs acknowledge, this action and Grace 1 are related cases. (Pl. Supp. Mem. at 7-11.)[5] "[T]he pendency of a similar or

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[5] This Court is aware that Judge Trager in Grace 1 denied Plaintiffs' motion to amend their pleadings to include the claims asserted in this case. See Grace v. Rosenstock, 169 F.R.D. 486 (E.D.N.Y. 1996) (Trager, D.J.), affirming, Grace v. Rosenstock, 169 F.R.D. 423 (E.D.N.Y. 1996) (Levy, M.J.); see also Grace v. Rosenstock, 228 F.3d 40, 55 (2d Cir. 2000) (affirming Judge Trager's decision "given, inter alia, the belated timing of the motion [to amend] and the fact that discovery would have to be reopened").) On appeal, the Second Circuit also observed that "generally the denial of

related action in the proposed transferee forums is universally recognized as a powerful reason for granting a motion for a change of venue." Richardson, 1988 WL 156324, at *4. And, given the fact that Judge Trager has been overseeing Grace 1 for nearly ten years, he is obviously in a strong position to adjudicate the claims asserted here. See, e.g., Kenwin, 1999 WL 294800, at *3-4; Savin v. CSX Corp., 657 F.Supp. 1210, 1214 (S.D.N.Y. 1987).

Plaintiffs' recent submissions suggest that Plaintiffs filed in this forum in order to avoid having their claims decided by Judge Trager. (Pl. Supp. Mem. at 7-11 ("the simple issue is might plaintiffs' counsel reasonably question the impartiality of Judge Trager").) The Court seeks to discourage this attempt at "judge shopping." See, e.g., Kellen Co., Inc. v. Calphalon Corp., F.Supp.2d 218, 223 (S.D.N.Y. 1999) ("Holding otherwise, 'would entail the danger that plaintiffs may engage in forum shopping or . . . judge shopping. When they see a storm brewing in the first court, they may try to weigh anchor and set sail for the hopefully more favorable waters of another district . . . .'") (citation omitted).

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leave to bring in new defendants does not have preclusive effect with respect to the claims against those defendants." Grace, 228 F.3d at 56.

The Court perceives no basis to grant a stay of the transfer. See Richardson, 1988 WL 156324, at *4 ("There is a strong policy favoring the litigation of related claims in the same tribunal . . . .").

Transfer of Related Action

In their Supplemental Memorandum (Pl. Supp. Mem. at 1 n.1), Plaintiffs noted that an action closely related to Grace 2, titled Grace et al. v. Harvey Schwartz et al., No. 03 Civ. 5668 (S.D.N.Y.) ("Grace 3"), is still pending before this Court. Precisely because Grace 2 and Grace 3 are related, at a December 3, 2003 status conference, it was agreed that Grace 3 would be consolidated with Grace 2 for all purposes, and the parties were, in fact, directed to submit a proposed consolidation order. No such order was submitted. For the same reasons Grace 2 was properly transferred to the Eastern District, Grace 3 should be transferred there as well - and hereby is.

Grace 2 and Grace 3 involve the same Plaintiffs - a class of shareholders of Briggs who hold a 1997 Judgment entered against Briggs in the Grace 1 action - who are seeking to set aside certain allegedly fraudulent conveyances made by Briggs to third parties. Grace 2 seeks to set aside conveyances from Briggs to Berger, Mack, Apex, and Bank Leumi. Grace 3 seeks to set aside said conveyances

from Briggs to Berger (compare Grace 2 Compl. ¶¶ 11, 13, 15-19 with Grace 3 Compl. ¶¶ 9-16), and also seeks to set aside subsequent conveyances from Berger to the Leo Berger Grantor Trust No. 1 ("Berger Trust") and the Estate of Leo Berger ("Berger Estate") (Grace 3 Compl. ¶ 2). Grace 3 names as defendants the Trustees of the Berger Trust, the personal representative of the Berger Estate, and Briggs ("Grace 3 Defendants"). The Defendants in Grace 2 include the Berger Estate and Briggs as well as Bank Leumi, Mack, and Apex.

The § 1404 transfer analysis applied to Grace 2 is equally applicable to Grace 3. Both the Southern and Eastern Districts of New York could exercise subject matter jurisdiction over Plaintiffs' Grace 3 claims. See Epperson, 242 F.3d at 106-07. Plaintiffs cannot reasonably assert that personal jurisdiction if found in the Southern District would be lacking in the Eastern District. (See supra, at 5.) And, venue is proper in the Eastern District under 28 U.S.C. § 1391 (b)(2), because, among other things, the fraudulent conveyances from Briggs to Berger involved real property located in the Eastern District. (See Grace 3 Compl. ¶¶ 9-16; 28 U.S.C. § 1391(b)(2) (venue is proper where "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated").)

The first five convenience factors favor transfer. See Richardson v. City of New York, No. 87 Civ. 214, 1988 WL 156324, at *4 (S.D.N.Y. Oct. 14, 1988). The sixth factor, Plaintiff's choice of forum, is again accorded little weight, given that Grace 3 is also a class action and an apparent attempt to judge-shop. The seventh factor favors transfer or is neutral, as both fora have "familiarity with the governing law."

And, as in the case of Grace 2, the eighth factor, "trial efficiency and the interests of justice," strongly favors transfer to the Eastern District, as "the pendency of a similar or related action in the proposed transferee forum is universally recognized as a powerful reason for granting a motion for change of venue." Richardson, 1988 WL 156324, at *4. Indeed, a substantial portion of the Grace 3 claims - those involving conveyances from Briggs to Berger - are identical to those asserted in Grace 2. "There is strong policy favoring the litigation of related claims in the same tribunal in order that pretrial discovery can be conducted more efficiently, duplicitous litigation can be avoided, thereby saving time and expense for both parties and witnesses, and inconsistent results can be avoided." Capital Venture Int'l. v. Network Commerce, Inc., No. 01 Civ. 4390, 2002 WL 417246, at *2 (S.D.N.Y. Mar. 15, 2002).

IV. Conclusion

For the foregoing reasons, Plaintiffs' motion [15] for reconsideration is granted in part and denied in part. The Court's Transfer Order, dated February 13, 2004, "transferr[ing] this case pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Eastern District of New York," is unchanged.

The Clerk is also directed to transfer the action titled Grace et al. v. Harvey Schwartz et al., No. 03 Civ. 5668 (S.D.N.Y.), to the United States District Court for the Eastern District of New York.

Dated: New York, New York
March 30, 2004

RICHARD M. BERMAN, U.S.D.J.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LORRAINE GRACE, et al.,

Plaintiffs,

-against-

BANK LEUMI TRUST COMPANY OF NEW YORK, DAVID MACK, THE ESTATE OF LEO V. BERGER, APEX MARINE CORP., and BRIGGS LEASING CORPORATION,

Defendants.

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02-CV-6612 (RMB)

NOTICE OF MOTION TO RECONSIDER THIS COURT'S MARCH 30, 2004 DECISION AND ORDER

PLEASE TAKE NOTICE, that plaintiffs, by their attorneys, Leventritt Lewittes & Bender, upon plaintiffs' memorandum, and the pleadings and proceedings heretofore had herein, will move this Court in Courtroom 706, at the United States District Court for the Southern District of New

York located at 40 Centre Street, New York, New York, on April 30, 2004, for the Court, pursuant to Local Civil Rule 6.3, to reconsider its March 30, 2004 Decision and Order (docketed on April 2, 2004) which granted in part and denied in part plaintiffs' motion to reconsider this court's February 13, 2004 order to transfer this case pursuant to 28 U.S.C.§ 1404(a) to the United States District Court for the Eastern District of New York and for such other further relief as this Court deems just and proper.

Dated: New York, New York
April 2, 2004

Respectfully submitted;

LEVENTRITT LEWITTES & BENDER

By: _____ (5341)
A member of the firm
19 W. 44th St., Suite 711
New York, New York 10036
(646) 562-0034

TO: Attorneys of Record

APPENDIX G

Plaintiff's motion for reconsideration (2d), dated 4/2/04, is respectfully denied. The Court is comfortable that its Decision + Order of 3/30/04 speaks for itself and Pl. offers no new authorities which were overlooked, etc. which would warrant further (re) consideration.

SO ORDERED:
Date: 4/5/04

Richard M. Berman, U.S.D.J

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LORRAINE GRACE, et al.,

Plaintiffs,

-against-

BANK LEUMI TRUST COMPANY OF NEW YORK, et al.,

Defendants.

----------x

02-CV-6612 (RMB)
AMENDED COMPLAINT

Plaintiffs, by their attorneys, LEVENTRITT LEWITTES & BENDER, as and for their Complaint herein allege as follows:

1. Plaintiffs class (sometimes "plaintiffs") hold a federal judgment for the amount of $4,028,000 against defendant Briggs Leasing Corporation ("Briggs"), a nominal defendant in this action. This is a civil action by plaintiffs' judgment creditors to set aside fraudulent conveyances of money, mortgages and notes, without consideration or for an unfair consideration, by Briggs to

defendants Bank Leumi Trust Company of New York ("Bank Leumi"), David Mack ("Mack"), Leo V. Berger (who died after the transfers in fraud of plaintiffs; the Estate of Leo v. Berger is the named party, hereinafter "Berger"), and Apex Marine Corp. ("Apex") and to collect plaintiffs' federal judgment against Briggs of $4,028,000 plus post-judgment compound annual interest of 5.58% or $1,258,272 for a total of $5,286,272 by requiring (i) defendant transferee Bank Leumi to pay plaintiffs $5,286,272 that it owes Briggs, (ii) defendant transferee Mack to pay plaintiffs $2,269,583 that he owes Briggs, (iii) defendant transferee Berger to pay plaintiffs $1,000,000 that he owes Briggs, and (iv) defendant transferee Apex to pay plaintiffs $1,252,803 that it owes Briggs. Inasmuch as the Supreme Court of the State of New York, County of Nassau entered a judgment in 1992 in favor of Bank Leumi against Briggs, *inter alia*, based on Briggs' fraudulent conveyances to Bank Leumi, that that judgment, as a matter of equity, be set aside. To the extent that Briggs gave any guarantees to Bank Leumi, Mack, Berger and Apex on loans by them to Robert Rosenstock personally, RER Motors, Inc. (a company owned by Rosenstock and Genser), or 51 Great Neck Road Associates, those guarantees should be rendered void as being without consideration or for an unfair consideration.

2. On August 15, 1997, a judgment was entered in favor of the plaintiffs class, *inter alia*,

against defendant Briggs in the amount of $4,028,000 and against Robert Rosenstock in the amount of $6,912,288 in an action in the United States District Court for the Eastern District of New York, Index No. 85-CV-2039 (DGT) (hereinafter "Grace #1"). No appeal was filed from that judgment; it was not modified or altered on appeal and is a final judgment. As a result of that litigation in Grace #1, plaintiffs are judgment creditors. Nothing has been collected from either of those judgment debtors, Briggs and Rosenstock. In fact, a writ of execution against Briggs by plaintiffs as judgment creditors was returned unsatisfied on March 10, 1998. Also, a writ of execution against Rosenstock was returned unsatisfied.

3. Jurisdiction over this case is founded on the enforcement of a judgment obtained in a federal court, the United States District Court for the Eastern District of New York, and arises out of Rule 69 of the Federal Rules of Civil Procedure which provides:

> Process to enforce a judgment for the payment of money shall be a writ of execution... The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the

> district court is held, existing at the time the remedy is sought...

The judgment in the Grace #1 litigation against Briggs was for the payment of money. That money judgment was entered in a federal court. On January 8, 2002, the Clerk of the United States District Court for the Eastern District of New York issued a Certification of Judgment for Registration In Another District (attached hereto as Exhibit A) with respect to the August 15, 1997 judgment entered in the Grace #1 litigation. Rule 69 requires that the practice and procedure of New York State be followed in this case "in proceedings" that aid execution and are in aid of a judgment. New York State's Civil Practice Law and Rules (CPLR) § 5225 entitled, "Payment or delivery of property of judgment debtor," and specifically the governing provision is § 5225(b), "Property not in the possession of judgment debtor." Plaintiffs judgment creditors have commenced this special proceeding against these defendants (other than Briggs) who are transferees of money, notes, mortgages, or other personal property from Briggs without fair consideration because the judgment debtor is entitled to the possession of such money and property or the plaintiff judgment creditors' rights to the property are superior to those of the transferee defendants.

4. Inasmuch as plaintiffs class, as judgment creditors, have been unsuccessful in collecting any money on their judgment against

Briggs and against Rosenstock, plaintiffs class are now suing on that August 15, 1997 judgment against Briggs to collect the $5,286,272 directly from the other defendants on the ground that those defendant transferees received in excess of that amount in money, mortgages, and notes from Briggs in transactions during the Grace #1 litigation that were not supported by fair consideration. Therefore, judgment debtor Briggs has an interest in the money and property transferred to the defendants without fair consideration.

5. Plaintiffs class were shareholders of Briggs, a public New York corporation, at the time of the fraudulent transfers by Briggs during the Grace #1 litigation. Briggs was engaged in the business of leasing automobiles to individuals and businesses. The plaintiffs class is exactly the same as when the August 15, 1997 judgment was entered except that the Estate of Morgan H. Grace was terminated and its interest was transferred by operation of law to: (i) Gerald I. White, Trustee U/W Morgan H. Grace for the Marital Deduction Trust, (ii) Gerald I. White, Trustee U/W Morgan H. Grace for the Non-Marital Deduction Trust and (iii) Gerald I. White, Trustee U/W Morgan H. Grace for the Generation Skipping Trust. Briggs is the only defendant in this case that was a party defendant in the Grace #1 litigation.

6. The principal transaction alleged in the Grace #1 litigation involved the freeze-out merger on or about February 26, 1985, of the

minority shareholders of Briggs by the self-interested majority defendant shareholders, Robert Rosenstock and Robert Genser, without business purpose and at a totally unfair price (hereafter referred to as "The Merger"). That Grace #1 litigation was brought under the federal securities laws (Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78 (j) and Rule 10b-5) and for breach of fiduciary duty under the laws of New York State.

7. During the Grace #1 litigation, Rosenstock and Genser designed and implemented fraudulent transactions whereby they caused Briggs to transfer money, mortgages and notes to defendants Bank Leumi, Mack, Berger and Apex without consideration or without fair consideration to the detriment of Briggs and plaintiffs minority class.

8. Upon information and belief, defendant Bank Leumi is a New York corporation which has its principal place of business at 139 Centre Street, New York, New York.

9. Upon information and belief, defendant Mack resides at 8 Sound View Lane, Kings Point, New York and has his principal place of business at 370 W. Passaic Street, Rochelle Park, New Jersey.

10. Upon information and belief, Berger, at the time of the subject transactions, resided at 7 Meadow Road, Old Westbury, New York; Berger owned 100% of the stock of defendant Apex, a New

York Corporation, and had his principal place of business at Apex, located at 2001 Marcus Avenue, Suite 215N, Lake Success, New York.

11. Rosenstock and Genser looted Briggs and appropriated to themselves and their businesses and properties, the value of Briggs' major asset, its real estate at 777 Northern Blvd. in Great Neck (hereinafter "777 Northern Blvd.") by a scheme whereby Rosenstock and Genser caused Briggs to execute notes and mortgages on 777 Northern Blvd. in order to divert a substantial part or all of the proceeds from such loans to Rosenstock personally or businesses and properties owned by him individually or with others, including without limitation, Genser. Plaintiffs in the Grace #1 litigation were not allowed to amend their complaint and make Bank Leumi, Mack, Berger and Apex parties in that litigation and were not allowed to assert the claims in this action against them, *Grace v. Rosenstock*, 228 F.3d 40, 56 (2d Cir. 2000), *cert. den.* 532 U.S. 923 (2001), holding that "generally the **denial of leave to bring in new defendants does not have preclusive effect with respect to the claims against those defendants**, *see Northern Assurance Co. of America v. Square D Co.*, 201 F.3d 84 (2d Cir. 2000)."

12. Pursuant to Rosenstock and Genser's Plan, Briggs executed the following notes, guarantees and gave mortgages on 777 Northern Blvd. to **Bank Leumi**:

(a) on November 22, 1986 in the amount of $270,000, of which the sum of $201,683.33 went for Robert Rosenstock personally by Bank Leumi issuing a check for that amount to Berger for Robert Rosenstock's purchase of Mr. Berger's 50% interest in 124 S. Middle Neck Road Associates to bring Robert Rosenstock's ownership to 100% and by Bank Leumi issuing a check to the New York State Tax Commission in the amount of $68,316.67 in connection with Mr. Rosenstock's non-Briggs property, 124 S. Middle Neck Road;

(b) on April 22, 1988, in the total amount of $6.1 million. Consideration of approximately $1.9 million out of the total loan proceeds of $6.1 million went to Briggs. The balance of the loan proceeds went to Rosenstock personally or businesses and properties owned by him individually or with others, including without limitation, Genser. Some examples are: (i) Bank Leumi issued a check for $743,175 to Berger to pay off Robert Rosenstock's personal note plus interest to Mr. Berger; (ii) $398,451.86 went to Belgrave Oldsmobile, Inc. a company owned by Rosenstock and Genser; (iii) a check for $306,185.53 was issued by Bank Leumi to Lane Holding Co. to pay off a mortgage on 732 Northern Blvd. in Great Neck that was

an obligation of RER Motors, Inc., Rosenstock and Genser's company; (iv) $270,000 was used to pay Bank Leumi for its loan to Briggs on November 22, 1986 where the proceeds were used for Robert Rosenstock's personal benefit as set forth in subparagraph (a) above; and (v) Rosenstock and Genser charged Briggs for the entire cost of the loan - $150,000, when Briggs should have paid only $45,000 as its share of the cost of the total loan. Briggs also used a significant part of the $450,000 transferred to it to pay interest and principal on loans to or for the personal benefit of Rosenstock and Genser; and

(c) on October 6, 19[illegible]8 in the total amount of $1,000,000, which in its entirety, went to Briggs Ford, an agency that was owned by Robert Rosenstock, his mother Charlotte Rosenstock, his sister Adrianne Rosenstock Halperin, and his brother-in-law James Halperin.

Bank Leumi had notice or knowledge of the Grace #1 litigation and knowledge that the loan proceeds from Bank Leumi under notes executed by Briggs did not go just to Briggs but went to Robert Rosenstock personally or to businesses and properties owned by Robert Rosenstock and others, including without limitation, Genser as above set forth. The notes, mortgages, guarantees and other

conveyances by Briggs to Bank Leumi were fraudulent as also above set forth and thus void.

13. Rosenstock and Genser caused Briggs to convey second, third, fourth and fifth mortgages on its real estate at 777 Northern Boulevard and caused Briggs to execute notes to Mack, Berger and Apex, where almost all of the proceeds from such loans went to Rosenstock personally or businesses and properties owned by him individually or with others, including without limitation, Genser:

(a) on February 10, 1989, the amount of the mortgage and note was $1 million to Mack where $900,000 of the proceeds went directly to GMAC, on behalf of Belgrave Oldsmobile, Inc., which was personally owned by Rosenstock and Genser; other parts of the remaining $100,000 was used for Rosenstock and Genser's personal benefit;

(b) on April 26, 1989, the amount of the mortgage and note was $1 million to Berger, of which $981,524 went into Robert Rosenstock's personal bank account at National Westminster Bank;

(c) on June 27, 1989, the total amount of the mortgages and notes was $1 million of which $500,000 was given to Apex and another $500,000 was given to Mack; $807,000 of the $1 million loan proceeds went into Robert Rosenstock's

personal bank account at National Westminster Bank and $175,000 was used to pay off a second mortgage and note on 51 Great Neck Road which was owned by 51 Great Neck Road Associates, Rosenstock and Genser's personal partnership; and

(d) on August 18, 1989, the total amount of the mortgages and notes was $500,000 of which $250,000 was given to Apex and another $250,000 was given to Mack; $493,500 of the loan proceeds went into Robert Rosenstock's personal bank account at National Westminster Bank.

14. Rosenstock and Genser caused Briggs to pay interest on the above mortgages and notes, which were almost entirely for the personal benefit of Rosenstock and Genser.

15. Despite knowledge by Mack, Berger and Apex that almost all of the **proceeds** of the loans made to Briggs as set forth in paragraph 13 either went into Robert Rosenstock's personal bank account or for the benefit of businesses or properties owned by Rosenstock and Genser, defendants Mack, Berger and Apex accepted notes and mortgages from Briggs as security when it knew Briggs only received a tiny fraction of the $3.5 million consideration they paid.

16. In 1986, 1988 and 1989, Rosenstock and Genser caused Briggs to issue mortgages and notes in the amount of $10.6 million to Bank Leumi, Mack, Berger and Apex. Out of the $10.6

million in cash generated from the mortgages less than $2 million went into Briggs and the balance was used for Robert Rosenstock's personal benefit and his joint ventures with Genser. Thus, the mortgages and notes were issued without fair consideration and were transfers in fraud of the plaintiffs stockholder class and made Briggs insolvent under New York's Debtor-Creditor law. Out of the $10.6 million in mortgages and notes issued by Briggs, it only recorded $3.7 million on its books.

17. On January 16, 1990 Rosenstock and Genser caused Briggs to sell its entire interest in its real estate at 777 Northern Blvd. to a third party for $4.65 million. On that same day as part of that transaction, Rosenstock and Genser caused Briggs to make payments of $4.1 million of the proceeds on the fraudulent mortgages: $3.1 million was paid to Bank Leumi, $500,000 was paid to Mack and $500,000 was paid to Apex; all such payments by Briggs were without fair consideration or without any consideration whatsoever. As a result, Briggs was left an empty shell.

18. The case against Robert Rosenstock and Briggs in the Grace #1 litigation was assigned to visiting Judge Charles R. Wolle with trial scheduled for August 11, 1997. It was settled on July 31, 1997. On August 4, 1997, Judge Trager entered a Final Order and Judgment against Robert Rosenstock and Briggs in the amounts of $6,912,288 and $4,028,000, respectively. Judgment

for the same amounts was entered by the Clerk on August 15, 1997 (Exhibit A).

19. Subsequently, the claims against Robert Genser in the Grace #1 litigation were dismissed after trial. That judgment was affirmed on appeal, *Grace v. Rosenstock*, 228 F.3d 40. On that same appeal, the defendants here – Bank Leumi, Mack, Berger and Apex – unsuccessfully attacked said August 15, 1997 judgment. A petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was denied in 2001.

COUNT I.

20. By virtue of the foregoing, Briggs issued notes, paid money for interest and principal on notes, and made conveyances of its real estate (through mortgages on its property at 777 Northern Blvd.) without fair consideration during the Grace #1 litigation which were fraudulent as to Briggs and plaintiffs under New York's Debtor-Creditor Law (hereinafter "DCL"), §273-a. Bank Leumi, Mack, Berger and Apex owe Briggs an amount in excess of $5,286,272. The conveyances or mortgages, issuance of notes, payment of money for interest and principal by Briggs set forth in paragraphs 12, 13 and 17 were accordingly transfers in fraud of Briggs and plaintiffs and were void.

21. Inasmuch as plaintiffs in this action were the plaintiffs stockholder class during the Grace #1 litigation when the fraudulent transfers

enumerated in paragraphs 12, 13 and 17 were made and plaintiffs have been unable to collect any money on its $4,028,000 judgment against Briggs, then plaintiffs here have the right to sue defendants on their $4,028,000 judgment against Briggs and collect $5,286,272 (including post judgment interest compounded annually) directly from defendants Bank Leumi, Mack, Berger and Apex under DCL § 273-a based on Briggs fraudulent transfers of money, mortgages and notes to said defendants without fair consideration.

COUNT II.

22. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 21 as if fully set forth herein.

23. By accepting first mortgages, guarantees and obligations under notes from Briggs in the amount of $7,100,000 on April 22, 1988 and on October 6, 1988 in exchange for less than $1,907,000 paid to Briggs as loan proceeds, Bank Leumi damaged Briggs and knew Briggs (i) would not be able to meet its debts as they matured; (ii) would not have sufficient capital to continue to operate its business; (iii) would be forced to borrow money almost immediately thereafter; (iv) would be placed in such perilous financial straits that it would be forced to sell its 777 Northern Blvd. property under duress; and (v) paid unearned interest and principal on the face amount of its debt to Bank

Leumi. Bank Leumi damaged Briggs by the amount of the fraudulent transfers, plus unearned interest and principal paid by Briggs to Bank Leumi. In addition, the payment by Briggs to Bank Leumi of $3,130,841 on January 16, 1990 was a fraudulent transfer since it was without fair consideration to Briggs. Therefore all of the above transfers by Briggs to Bank Leumi were made without fair consideration and were in violation of DCL § 273-a and should be set aside as void.

24. By reason of the foregoing, the 1992 judgment obtained by Bank Leumi against Briggs in the Supreme Court of the State of New York, County of Nassau, should be set aside since it was also based on said fraudulent transfers in violation of DCL §273-a.

WHEREFORE, plaintiffs pray for an order and judgment:

a. That defendant Bank Leumi pay $5,286,272 in damages to plaintiffs;

b. That defendant Mack pay $2,269,583 in damages to plaintiffs;

c. That defendant Berger pay $1,000,000 in damages to plaintiffs; and

d. That defendant Apex pay $1,252,803 in damages to plaintiffs;

e. That the fraudulent transfers to defendants Bank Leumi, Mack, Berger and Apex be set aside as void;

f. That this Court as a matter of equity set aside the 1992 judgment entered by the Supreme

Court of the State of New York, County of Nassau in favor of Bank Leumi and, *inter alia*, against Briggs inasmuch as it was based on fraudulent conveyances and Rosenstock and Genser wrongfully caused Briggs not to defend that action.

g. That the Court grant such other, further, and different relief as may be just, including damages, together with costs, disbursements, interest and a reasonable fee for plaintiffs' attorneys.

Dated October 28, 2002

LEVENTRITT LEWITTES & BENDER

By:_____(5341)
A Member of the Firm
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APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LORRAINE GRACE, et al.,

Plaintiffs,

- against -

ROBERT ROSENSTOCK, et al.,

Defendants.

CERTIFICATION OF JUDGMENT FOR REGISTRATION IN ANOTHER DISTRICT

Case Number: 85-CV- 2039

I, Robert C. Heineman, Clerk of the United States District Court certify that the attached judgment is a true and correct copy of the original judgment entered in this action on AUGUST 15, 1997, as it appears in the records of this court, and that no notice of appeal from this judgment has been filed, and no motion of any kind listed in Rule 4(a) of the Federal Rules of Appellate Procedure has been filed.

IN TESTIMONY WHEREOF, I sign my name and affix the seal of this Court.

JANUARY 8, 2002	ROBERT C. HEINEMANN
Date	*Clerk*
	_____
	(By) Deputy Clerk

EXHIBIT A

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LORRAINE GRACE, et al.,

Plaintiffs,

- against -

ROBERT ROSENTSTOCK, et al.,

Defendants.

----------x

JUDGMENT
85-CV-2039 (DGT)

An order of the Honorable David G. Trager, United States District Judge, having been filed on August 5, 1997, no just reason for delay entering judgment in favor of plaintiffs class against defendant Robert Rosenstock in the amount of $6,912,228.00; entering judgment in favor of plaintiffs class against defendant Briggs Leasing Corporation in the amount of $4,028,000.00; continuing this action by plaintiffs class against defendant Robert Genser which action is hereby severed and adjourned based on the representation that defendant Genser will file a petition in

bankruptcy on or before September 29, 1997; directing that the action in Supreme Court of the State of New York, County of New York, Index No. 96/600193, is moot only as to defendant Robert Rosenstock; and, directing that the action by plaintiffs as petitioners in the Supreme Court of the State of New York, County of Nassau (Index No. 13312, 1985), against Briggs Leasing Corporation, respondent, to fix the fair value of petitioners' shares as dissenting shareholders under Section 623 of the Business Corporation Law is moot, it is

ORDERED and ADJUDGED that final judgment is hereby entered in favor of the plaintiffs class against defendant Robert Rosenstock in the amount of $6,912,288.00; that final judgment is hereby entered in favor of the plaintiffs class against defendant Briggs Leasing Corporation in the amount of $4,028,000.00; that this action shall continue by plaintiffs class against defendant Robert Genser which action is hereby severed and adjourned based on the representation that defendant Genser will file a petition in bankruptcy on or before September 29, 1997; that the action in Supreme Court of the State of New York, County of New York, Index No. 96/600193 is moot only as to defendant Robert Rosenstock; and, that the action by plaintiffs as petitioners in the Supreme Court of the State of New York, County of Nassau (Index No. 13312, 1985), against Briggs Leasing Corporation, respondent, to fix the fair value of

petitioners' shares as dissenting shareholders under Section 623 of the Business Corporation Law is moot.

Dated: Brooklyn, New York
August 12, 1997

ROBERT C. HEINEMANN
Clerk of Court

By: _____
James Giokas
Chief Deputy Clerk

Filed in Clerk's Office
U.S. District Court E.D.N.Y.
August 15, 1997

A True copy Attest
Dated January 02, 2002
Robert C. Heinemann
Clerk
By _____
Deputy Clerk